STATE OF NEW HAMPSHIRE
SUPREME COURT

2017-0409

STATE OF NEW HAMPSHIRE

V.

DAVID BURRIS

ON INTERLOCUTORY APPEAL FROM THE ROCKINGHAM SUPERIOR COURT

REPLY BRIEF OF APPELLANT DAVID BURRIS

For Appellant
David Burris:

Peter J. Perroni
Nolan | Perroni, PC
73 Princeton Street
No. Chelmsford, MA 01863
978-454-3800
peter@nolanperroni.com
NH Bar No. 16259

TABLE OF CONTENTS

Table of Authorities

Cases

Statutes and other Authorities

ISSUE PRESENTED FOR REVIEW

Whether Part 1, Article 15 of the New Hampshire Constitution, as construed by the Supreme Court in State v. Nowell, 58 N.H. 314 (1878), requires that a public employee be afforded transactional immunity when he or she is compelled by a public employer to furnish statements under the threat of termination? (App. 5-23).

REPLY ARGUMENT

I. TRANSACTIONAL IMMUNITY IS NOT "RIPE FOR ABUSE," UNWORKABLE OR IMPRACTICAL.[1]

In urging the Court to ignore the mandate of Article 15, the State predicts of a parade of horribles flowing from the use of a transactional immunity standard. The State asserts that adoption of the Appellant's argument would be "ripe for abuse in the wrong hands," impracticable and unworkable. (Brief at 16, 21). None are true. Beyond it being a constitutional requirement, transactional immunity for compelled statements is workable in practice. Until the legislative amendment of the immunity statute in 1993, transactional immunity was the price required to be paid for all compelled testimony. See RSA 516:34; see generally,

[1] The vast majority of the State's contentions are addressed directly in the Appellant's Opening Brief and, therefore, are not rehashed in this Reply Brief.

State v. MacManus, 130 N.H. 256 (1987) (noting transactional immunity required under prior version of statute).[2] Moreover, as conceded by the State and set forth in the Opening Brief, transactional immunity remains the law governing compelled statements in numerous jurisdictions with effective and efficient criminal justice systems.

The State suggests that the power to grant immunity "would be ripe for abuse in the wrong hands." (Brief at 16). In doing so, the State ultimately makes the Appellant's point that it is impossible to assure that there will not be improper use of a compelled statement. As the Appellant asserted in his Opening Brief and numerous courts have observed, "even a prosecutor acting in the best of faith cannot be certain that somewhere in the depths of his investigative apparatus, often including hundreds of employees, there was not some prohibited use of the compelled testimony." Kastigar v. United States, 406 U.S. 441, 469 (1972) (Marshall, J. dissenting); see, also, State v. Miyasaki, 614 P.2d 915, 921-923 (Haw. 1980). In the end, the State invites the Court to fear phantom illicit behavior, while ignoring the real possibility, even

[2] While the immunity statute is not directly implicated in this case, it's vitality would certainly be in question should the Court adopt the Appellant's position.

likelihood, of intentional or unintentional, often undetectable, use and abuse of the compelled statement by administrative personnel, investigators or prosecutors. State v. Gonzalez, 853 P.2d 526, 532 (Alaska 1993)("[The] incurable inability to adequately prevent or detect nonevidentiary use, standing alone, presents a fatal constitutional flaw in use and derivative use immunity.").

Affording transactional immunity is practicable. Article 15 simply requires employers to obtain transactional immunity prior to compelling a public employee to answer questions under threat of termination. The employee may not refuse to answer questions where no criminal conduct is implicated. Massachusetts Parole Bd. v. Civ. Serv. Comm'n., 716 N.E.2d 155, 159 (Mass. App. 1999) ("[W]e do not construe the Carney decision to permit an employee to circumvent an investigatory proceeding by claiming generalized constitutional rights prior to the time the inquiry has advanced to a level of specificity where the claim can be properly evaluated in a particularized context."); Parole Board v. Waxman, No. 9322541993, 1993 WL 818901 *3 (Mass. Super. Sept. 10, 1993) ("[P]rivilege against self-incrimination applies only to

answers which might tend to incriminate; if questions are not of an incriminating nature they must be answered").[3] Moreover, when the employee refuses to answer questions involving potential criminal liability and the employer is unable to obtain grants of transactional immunity from the Attorney General and County Attorneys, the administrative investigation can proceed without the employee's statement. In these circumstances, the employee's constitutional right is preserved while administrative and criminal investigation and prosecution proceed unabated.

The State's contention that transactional immunity is impractical also ignores its relative procedural simplicity when compared to the Kastigar hearing and the often prolonged and difficult litigation about whether improper use or derivative use has been made of a compelled statement. As one trial court in New Hampshire has noted:

> It is clear from Kastigar that the prosecution may not make "use of compelled testimony . . . [or] evidence derived

[3] Accordingly, any fear that public employees will obtain a blanket right not to answer questions posed by their public employees is unfounded. "The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified . . . " Murphy v. Commonwealth, 354 Mass. 81, 83 (1968) (quoting Hoffman v. United States, 341 U.S. 479, 486 (1951)).

directly and indirectly therefrom" at trial. [Kastigar v. United States, 406 U.S. 441, 453 (1972)]. What remains an open question after Kastigar is whether the prosecution may make any nonevidentiary use of the compelled testimony. Nonevidentiary uses "could conceivably include assistance in focusing the investigation, deciding to initiate prosecution, refusing to plea-bargain, interpreting evidence, planning cross-examination, and otherwise generally planning trial strategy." [U.S. v. McDaniel, 482 F.2d 305, 311 (8th Cir. 1973)]. Courts have differed on whether and to what extent nonevidentiary uses are impermissible under Kastigar. Some have held that Kastigar forbids "all prosecutorial use of the testimony, not merely that which results in the presentation of evidence before the jury." Id. Under this stricter formulation, the mere exposure of compelled testimony to a prosecutor may have an "immeasurable subjective effect" that taints the prosecution's presentation of the evidence at trial. Id. at 312. The difficulty in disproving such taint may make the government's burden of proof at a Kastigar hearing "virtually undischargeable." Id.

Other courts reject this interpretation of Kastigar and permit a prosecution to move forward if the only risk is that the prosecutor's exposure to immunized testimony will "tangentially influence[ ] [his] thought processes in . . . preparing for trial . . ." United States v. Mariani, 851 F.2d 595, 600 (2d Cir. 1988). In other words, a prosecutor's knowledge of immunized testimony alone is not an "impermissible use of that testimony." Id. at 601. As support for this more permissive position, these courts have drawn an analogy to the remedy for a coerced confession, which has never "prohibited the nonevidentiary use of an involuntary statement." United States v.

Serrano 870 F.2d 1, 18 (1st Cir. 1989).

State v. Richardson, No. 218-2014-CR-00461, 2014 WL 7009287 at *12 (N.H. Super. Dec. 2, 2014).

Application of the use and derivative use rule is easier said than done and requires painstaking procedural diligence. See, e.g., United States v. Slough, 641 F.3d 544, 550 (D.C. Cir. 2011)(noting that evidence must be parsed witness-by-witness, line-by-line and item-by-item to "separate the wheat of the witnesses' unspoiled memory from the chaff of the immunized testimony." (quoting United States v. North, 910 F.2d 843, 855 (D.C. Cir. 1990)). Ultimately, when comparing the practical implications of granting use and derivative use immunity as opposed to transactional immunity, it becomes clear that transactional immunity--in addition to meeting the constitutional standard--provides the more workable framework.

II. NOWELL SHOULD NOT BE OVERRULED.

The Court should reject the State's invitation to overrule State v. Nowell, 58 N.H. 314 (1878). As the State concedes, the overruling of a case must, consistent with the need for a dependable and predictable rule of law, be saved for exceptional circumstances. State v. Balch 167 N.H. 329, 334 (2015). In Balch, the Court explained:

> The key question in determining whether to overrule a prior decision is not whether we disagree with it, but whether it "has come to be seen so clearly as error that its enforcement was for that very reason doomed." . . . We consider four factors in determining whether a prior decision has come to be seen as clear error: (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. . . . Evaluation of the four factors requires balancing the various interests involved because no single factor is dispositive and the factors are not meant to be "rigidly applied or blindly followed."

Id. at 676 (internal citations omitted). Evaluation of these touchstones militates strongly against overruling Nowell.

As discussed above, in the context of compelling public employees to provide statements that may involve criminal liability, a rule requiring transactional immunity is no less workable than a rule providing use or derivative use immunity. Contrary to the State's contention, the rule would not give "public entities unfettered power to grant immunity from criminal prosecution." (Brief at 23). Instead, the rule would

require public entities to obtain such immunity from prosecutors prior to the time it compels public employees to provide statements which may reasonably lead to criminal prosecution. See Baglioni v. Chief of Police of Salem, 421 Mass. 229, 234-35 (1995) (upholding grant of declaratory judgment to officers preventing compulsion to answer questions absent grant of immunity from appropriate prosecutorial entity). To the extent that employees were disciplined for the failure to adhere to the compulsion in the absence of transactional immunity, such discipline would be unlawful. See Carney v. Springfield, 403 Mass. 604, 610 (1988); Gardner v. Broderick, 392 U.S. 273 (1968) (prohibiting state from firing police officer who refused to waive Fifth Amendment privilege and testify before grand jury). Accordingly, the first touchstone is not satisfied.

Overruling Nowell, would also force the Appellant to shoulder an especially heavy burden as he expressly relied upon Nowell when he agreed to provide the DOC both the written and oral statements regarding the subject incident. In the absence of a legal framework and process upon which to make his claim--the Court has yet to decide this precise issue--the Appellant appropriately invoked his right prior to providing his statement. Commonwealth v. Dormady, 423 Mass. 190, 195-96 (1996)

(finding that transactional immunity attached when asserted by the employee before compelled statement even though Chief of Police and Town Counsel would not have authority to grant such immunity).[4] As such, the second factor also weighs heavily against abandonment of the Nowell rule.

Finally, concepts of neither law nor fact have changed to render the rule of Nowell outdated or meaningless. Most obviously, the Massachusetts Constitution, from which Article 15 was replicated, has continued to demand transactional immunity. Numerous other jurisdictions continue to follow the rule. See Batch, 167 N.H. at 335 (rule not outdated where jurisdictions are divided as to its application). Indeed, given the efficiency of the machinery of state and the ease of communication between different branches of government the additional protection afforded by transactional immunity is needed more than ever.[5] The rule is the only way to guarantee the fundamental promise of

---

[4] Moving forward--should the Court adopt the Appellant's position--the Appellant anticipates that the process described herein will govern the procedure for compelled statements. The public employer may order an employee to provide a statement under threat of termination. The public employee can demand that the employer obtain transactional immunity before answering questions reasonably related to potential criminal liability. If the employer moves forward and disciplines the employee based on the failure to comply with the order in the absence of transactional immunity, the employee may seek recourse to remedy the discipline.

[5] As noted in the Opening Brief, without yet having the benefit of a Kastigar hearing, the facts known about the course of this investigation and communications between the County Attorney, Department of Correction and Attorney General's Office, do little to quell concern of inadvertent or other disclosure and use of the Appellant's statement or fruits therefrom.

Article 15 and it is imminently more workable than the Kastigar process in practice. Nowell remains good law and should not be overturned by this Court.

CONCLUSION

For the reasons set forth herein and in the opening brief, the Defendant respectfully requests that the trial court's order denying the Defendant's Motion to Dismiss be **REVERSED**, that an Order granting the Motion to Dismiss be entered and that the indictments be dismissed with prejudice.

Pursuant to Rule 16(3)(i), undersigned counsel certifies that the the appealed decision is in writing and is appended to the Opening Brief at Addendum page 1.

Respectfully Submitted,
David Burris,
By his lawyer,

Peter J. Perroni
NH Bar. No. 16259
Nolan | Perroni, P.C.
73 Princeton Street
North Chelmsford, MA 01863
978-454-3800
peter@nolanperroni.com

DATED: December 21, 2017

CERTIFICATE OF COMPLIANCE

In accordance with New Hampshire Supreme Court Rule 16(7), the undersigned hereby certifies that an original and eight (8) copies of the Brief of the Appellant David Burris have been hand-delivered to the Clerk of the Supreme Court this 29th Day of September 2017.

In accordance with New Hampshire Supreme Court Rule 16(10), the undersigned hereby certifies that two copies of the Brief of the Appellant have been forwarded, via first class mail, postage prepaid to the Office of the New Hampshire Attorney General, .

In accordance with New Hampshire Supreme Court Rule 16(10), the undersigned hereby requests that this matter be heard on oral argument and , further, that Peter J. Perroni be designated as the attorney to argue its merits on behalf of the Appellant. Counsel requests fifteen (15) minutes for argument.

Dated: 12/21/17

Peter J. Perroni